WILKEN SDN BHD

v.

CHUA BENG HOCK & ORS

HIGH COURT, KUALA LUMPUR
AZMEL MAAMOR J
[CIVIL SUIT NO: S6(S9)-22-199-2001]
20 SEPTEMBER 2003

CIVIL PROCEDURE: *Service - Writ of summons - Service through prepaid AR registered post - Whether AR card must be personally signed or acknowledged by each defendant - Whether plaintiff's inability to produce AR card personally signed by defendant rendered service of writ bad - Whether default judgment irregularly obtained - Whether should be set aside ex debito justitiae - Rules of the High Court 1980, O. 10 r. 1(1)*

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The plaintiff had earlier brought a claim against the 1st defendant (as borrower) and the 2nd, 3rd and 4th as defendants (as guarantors) with respect to a RM25 million loan which it had disbursed to the 1st defendant. Thereafter, the plaintiff had obtained judgment in default against the 1st and 2nd defendants but it was subsequently set aside by the deputy registrar. This was an appeal by the plaintiff to the judge-in-chambers from the said decision of the deputy registrar setting aside the default judgment. The sole issue that arose for determination was whether the plaintiff's writ of summons and statement of claim had properly been served on the 1st and 2nd defendants.

Held (dismissing the appeal):

[1a] Pursuant to O. 10 r.1(1) of the Rules of the High Court 1980 ('RHC'), a writ must be served personally on each defendant or by sending it by prepaid AR registered post addressed to his last known address. (p 166 c-d)

[1b] If a plaintiff decides to effect service by way of prepaid AR registered post, it will then be incumbent upon him to produce the duly acknowledged AR card as proof of effective service on the defendant. It is mandatory to show that the AR card has been signed or acknowledged by each of the defendants personally. In the instant case, there was no such acknowledgement; hence, there was no proper service of the plaintiff's writ of summons and statement of claim on the 1st and 2nd defendants. The plaintiff could not rely on the provisions of the Postal Services Act 1991 to show effective service under O. 10 r.1(1) RHC. (p 167 b-d)

[2] The plaintiff also did not explain why there were two dates appearing on the AR card. Although one of the two dates had been cancelled out, this had left a doubt as to when the plaintiff's writ of summons and statement of claim was actually 'served' on the 1st and 2nd defendants. (p 167 d-f)

[3] The deputy registrar was thus right in holding that the judgment in default was not regularly obtained and had to be set aside *ex debito justitiae.* (p 168 a-b)

Case(s) referred to:
Tuan Haji Ahmad Abdul Rahman v. Arab Malaysian Finance Bhd [1996] 1 CLJ 257 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O.10 r.1(1) RHC

For the plaintiff - Richard Lee; M/s Cheah Teh & Su
For the defendants - A Onn; M/s Onn & Partners

Reported by Gan Peng Chiang

JUDGMENT

Azmel Maamor J:
The plaintiff's claim against the 4 defendants was in respect of a friendly loan in the sum of RM25 million which the plaintiff claimed had been disbursed to the 1st defendant as the Borrower. The said loan was guaranteed by the 2nd, 3rd and 4th defendants jointly and severally.

On 17 May 2001 on an application by the plaintiff a judgment in default was obtained by the plaintiff against the 1st and 2nd defendants (Enclosure 4). However on 26 September 2001 the 1st and 2nd defendants applied to set aside

the said judgment in default (Enclosure 25). The learned Deputy Registrar who heard the application gave a decision to set aside the default judgment and also gave leave to the 1st and 2nd defendants to enter appearance and file their Statements of Defence. It was against this decision of the Deputy Registrar that the plaintiff lodged an appeal to the Judge in chambers (Enclosure 41).

The only main issue that was raised in respect of this appeal was whether the Writ of Summons and the Statement of Claim had been properly served on the 1st and 2nd defendants. Service of writs is governed by 0.10 r. 1(1) of the Rules of the High Court, 1980 which states:

> *Subject to the provision of any written law and these rules, a writ must be served personally on each defendant or by sending it by prepaid A.R. registered post addressed to his last known address.*

As clearly stated in the above said rule there are two ways to serve a writ on the defendant. Firstly, it may be done by affecting personal service on the defendant and secondly, by sending the documents by prepaid A.R. registered post addressed to the defendant's last known address. If the plaintiff decides to effect service by way of prepaid A.R. registered post it would be incumbent upon the plaintiff to produce the duly acknowledged A.R. card as proof of effective service on the defendant. That, in my view, seems to be the gist of 0.10 r.1(1) of RHC.

In the instant case the plaintiff had opted to effect service by way of prepaid A.R. registered post on the 1st and 2nd defendants. It was strongly contended by the defendants that the service of the writ on them was irregular because the writ was not served on them and they had not put their signatures on the A.R. cards. Nor were the A.R. cards signed by anyone on behalf of the two defendants. On the other hand the A.R. cards that were exhibited by the plaintiff were signed by a representative of the Ketua Pos. The defendants strenuously argued that since the A.R. cards were not signed by them the service of the said writ on the defendants was not in conformity with the provisions of 0.10 r.1(1) RHC.

In addition to that the defendants contended that there appeared to be two dates in respect of the service of the writ on the 2 defendants. The 1st date on the chop was 15 May 2001 but this date was cancelled and replaced by another date 26 April 2001. No explaination had been given by the person who made the cancellation. It is very important to give an explaination as to why such cancellation had been made to the original date of 15 May 2001. In the absence of any reasonable explaination given in respect of the cancellation of the date serious doubts would certainly arise as to the authenticity of the date of service

of the writ. Due to the existence of the two dates the defendant would be at liberty to make use of the date which is more favourable to him. In this particular case the date of hearing of the plaintiff's application was 17 May 2001. If the defendants chose to take 15 May 2001 instead of 26 April 2001 as the date of service of writ on them then it was certainly a case of short service to have the hearing of the application on 17 May 2001 as the defendants are given a period of 12 days to enter appearance from the date of service. Because of this short service the order given on 17 May 2001 would also be unlawful.

After having considered submissions from the Counsel for the plaintiff and for the 1st and 2nd defendants and after having taken into consideration all the facts and circumstances of this case I was in full agreement with the submission of the Counsel for the defendants. The provisions of the Postal Services Act, 1991 on which the plaintiff's Counsel had placed great reliance could not be used by the plaintiff to show effective service under O.10 r.1(1) of the Rules of the High Court, 1980. I was of the view that in effecting service using the prepaid A.R. registered post it is mandatory to show that the A.R. card was signed or acknowledged by each of the defendants personally. Without such acknowledgement there would be no proper service as was in this case. Secondly, the defendants created great doubts as to the actual date on which the service of the writ was effected on the defendants because 2 dates appeared on the A.R. cards. There were no adequate explainations as to how or why there were 2 dates appearing on the A.R. cards as well as the reason for the cancellation of one date and by whom. Because two dates appeared on the cards the defendants are at liberty to use the date more favourable to them. The two dates were 15 May 2001 and 26 April 2001. The defendants had chose 15 May 2001 as the date for the service of the court on them. The date of the hearing of the plaintiff's application was 17 May 2001 which was 2 days after the service. This would definitely be a case of short service. The defendants would have 12 more days to enter appearance.

In the light of the above circumstances I was of the view that the judgment of default of 17 May 2001 was not regularly obtained. The position of a judgment which is not regularly obtained has been clearly stated in the judgment of the Federal Court case of *Tuan Haji Ahmad Abdul Rahman v. Arab Malaysian Finance Bhd.* [1996] 1 MLJ 30 where His Lordship Edgar Joseph FCJ said:

> *The general rule is that when it is clearly demonstrated to the satisfaction of the Court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justitiae, that is to say, irrespective of the merits and without terms.*

This court is bound by the principle as pronounced by the Federal Court. In this case I was fully convinced that the defendants had shown to my satisfaction that the default order obtained on 17 May 2001 was irregular for want of proper service. I therefore arrived at the conclusion that the learned Deputy Registrar had made the correct decision in allowing the defendants' application to set aside the default judgment of 17 May 2001.

In the circumstances I dismissed the plaintiff's appeal with costs.